Hastings Communications and Entertainment Law Journal

Volume 4 | Number 4 Article 9

1-1-1982

Double-Breasted Operations - Construction Tool Being Used in Broadcast Industry

Mary Ellen Krug

Double-Breasted Operations—Construction Tool Being Used In Broadcast Industry*

By MARY ELLEN KRUG**

I
What Are They?

"Double-breasted" operations evolved from the construction industry's practice of operating an enterprise as two or more companies, some under union contracts and others under non-union contracts, though the companies are owned by a parent entity. Such an arrangement gave construction contractors the flexibility necessary to compete simultaneously with union and nonunion competitors. A double-breasted operation allows the parent entity to bid effectively for and compete in all available work. Although the practice originated in the construction industry, double-breasted operations have proven to be useful in a number of businesses, especially in chains of similar enterprises such as stores and newspapers.[1]

The catchy phrase "double-breasted" is of fairly recent currency, but the legal issues and principles are as old as the Wagner Act[2] and concern one question: Is this hydra-headed creature one employer or more than one? If the creature is regarded as a single employer within the meaning of the National Labor Relations Act, a contract negotiated for the employees of one component may apply to the employees of another component, much to the parent entity's surprise. In addition, if the

---

* The original research for this paper was done by Miss Krug. Her partner, Jerome L. Rubin, delivered the paper with his own comments in her absence. She has edited the initial draft and Mr. Rubin's remarks for this publication.

** A.B., 1939, and L.L.B., 1943, University of Washington. Partner, Schweppe, Doolittle, Krug, Tausend & Beezer, Seattle, Washington.

1. *See, e.g.*, Peter Kiewit Sons' Co., 206 N.L.R.B. 562 (1973), *rev'd on other grounds*, Local No. 627, Int'l Union of Operating Eng'r v. NLRB, 518 F.2d 1040 (D.C. Cir. 1975), *modified sub. nom.* South Prairie Constr. Co. v. Local No. 627, Int'l Union of Operating Eng'r, 425 U.S. 800 (1976) (construction industry); A-1 Fire Protection, Inc., 233 N.L.R.B. 38 (1977) (sprinkler installation industry).

2. 29 U.S.C. § 151 (1935).

employees of one component strike, other components may be subjected to picketing.

In the newspaper industry, the larger newspaper chains have confronted numerous problems related to double-breasted operations. For example, if a Detroit newspaper strikes, can the union picket a nonstriking Florida paper which is under the same ownership as the Detroit paper? In the same town? If one aspect of production is handled by a separate though commonly-owned entity, may this separate entity be picketed? Likewise, if a television station operates an AM radio station and, perhaps, an FM station, is the television station a single employer or are the television and radio stations multiple employers? There is no universally acceptable answer which is more advantageous from an employer's standpoint.

An owner's interest in having single employer status depends on the circumstances, pattern and history of organization in the community or industry. For example, an owner may prefer to administer all its operations under a single union control; it may deem organization more difficult if several branches must be organized separately. On the other hand, the history of the business or of the organization may dictate different unions in different departments, branches and locations or, in some cases, no union at all. The advantages and disadvantages of operating as a single employer or as several distinct employers depend on the needs of the individual business as seen by its owners.

To achieve a successful double-breasted operation each component must maintain separate employer status. If each component is not a separate employer, each may be denied the protection of the prohibition against secondary boycotts, one component may be held liable for the unfair labor practices of the other, and in cases where the contract language permits, union contracts may unexpectedly cover what were thought to be separate, independent enterprises. Substantial back pay liability for failing to honor a contract or to reinstate a striker lurks in unfavorable answers to these questions.[3]

NLRB and court decisions have set forth criteria to determine whether an operation has single or multiple employer status and whether an intended double-breasted operation has

3. See note 38 and accompanying text, *infra*.

achieved the desired degree of independence sought by its owners.

II
Criteria for Determining Single Employer Status

In *Radio Union v. Broadcast Service of Mobile, Inc.*,[4] the Supreme Court recognized the four controlling criteria for determining whether a "single employer" exists: interrelated operations, common management, centralized control of labor relations, common ownership and a high degree of financial control.[5] These factors frequently overlap and court decisions often turn on factual distinctions. It is not necessary that each criterion be met before several apparently independent, though commonly-owned, components may be held to be a single employer.[6] However, the degree of common control of labor relations policies is the critical factor in finding single employer status, although such control is not the sine qua non of such status.[7]

Employers have argued unsuccessfully that the existence of the four criteria at merely the executive or top levels precludes a finding of single employer status.[8] Thus, the presence of the criteria, especially common management and centralized control of labor relations at the top levels of a business may result in a finding of single employer status. Fortunately, the NLRB and the courts have generally examined the actual, rather than potential, exercise of control in deciding whether two or more businesses constitute a "single employer." Actual control depends on whether an "arm's length" relationship exists among separately owned companies.[9]

Against this background, each criterion of single employer status will be examined.

---

4. 380 U.S. 255 (1965).

5. *Id.* at 256. *See also* Newspaper Production Co. v. NLRB, 503 F.2d 821, 826-27 (5th Cir. 1974).

6. Canton, Carp's Inc., 125 N.L.R.B. 483 (1959).

7. Local No. 627, Int'l Union of Operating Eng'r v. NLRB (Peter Kiewit Sons' Co.), 518 F.2d 1040 (D.C. Cir. 1975), *aff'd on this issue sub nom.* South Prairie Constr. Co. v. Local No. 627, Int'l Union of Operating Eng'r, 425 U.S. 800 (1976); NLRB v. Transcontinental Theatres, Inc., 568 F.2d 125, 129-30 (9th Cir. 1978).

8. *See, e.g.*, Sakrete of Northern California, Inc. v. NLRB, 332 F.2d 902, 907 (9th Cir. 1964), *cert. denied*, 379 U.S. 961 (1965).

9. Local No. 627, Int'l Union of Operating Eng'r v. NLRB (Peter Kiewit Sons' Co.), 518 F.2d at 1046; Los Angeles Newspaper Guild, Local 69, 185 N.L.R.B. 303, 304 (1970).

III
Interrelations of Operations

An interrelation of operations probably will signify a single employer, if there is interchange of key personnel between the two businesses,[10] if employees shift "employers" without quitting their first "employer" or without applying to their second,[11] or if there is a failure to keep the assets and property of the components separated.[12]

In *A-1 Fire Protection*,[13] the NLRB found that two companies set up in a double-breasted fashion constituted a single employer. The companies performed the same work, used the same tools, trucks and equipment, and worked out of the same office.[14] Similarly, in *Local No. 627, International Union of Operating Engineers v. NLRB* (Peter Kiewit Sons' Co.),[15] the District of Columbia Circuit Court reversed an NLRB ruling stating that two subsidiaries of Kiewit, Inc. were separate and distinct employers.[16] In finding single employer status, the court pointed to the interchange of key personnel between the subsidiaries, the fact that the boards of directors of the two subsidiaries shared offices and the fact that the nonunion subsidiary took over the union subsidiaries' Oklahoma office and storage yard.[17]

Other cases, although not specifically concerning double-breasted operations, have considered the interrelation of operations to decide whether single employer status exists. Where the president of one company established the general rules concerning wages, hours and work conditions of the second company, a single employer was found. However, two divisions of a corporation constitute *separate employers* where division heads have substantially complete authority in the day-

10. Local No. 627, Int'l Union of Operating Eng'r v. NLRB (Peter Kiewit Sons' Co.), 518 F.2d at 1047.

11. *Id.*

12. A-1 Fire Protection, Inc., 233 N.L.R.B. 38 (1977), *modified*, 600 F.2d 918 (D.C. Cir. 1979).

13. 233 N.L.R.B. 38 (1977).

14. *Id.* at 39.

15. 518 F.2d 1040 (D.C. Cir. 1975), *rev'd on other grounds sub nom.* South Prairie Const. Co. v. Local No. 627, Int'l Union of Operating Eng'r, 425 U.S. 800 (1976).

16. 518 F.2d at 1047.

17. Sakrete of Northern California v. NLRB, 332 F.2d at 906.

to-day operations of their respective divisions.[18] Single employer status is also accorded if one company's involvement in the daily business affairs of the other includes management policy-making, sales, purchasing, clerical work, accounting, employee training, technical assistance, production consultation and daily advice.[19] Even if each employer maintains separate payrolls, bank accounts and tax returns, single employer status exists where the components used the same tools and transferred employees from one payroll to the other.[20] On the other hand, components do not constitute a single employer where actual day-to-day common control is absent, even if potential common control is present.[21]

To avoid an integration of operations which leads to single employer status, and thus a defeat of a double-breasted operation, separate legal identities, offices, mailing addresses, telephone numbers, personnel records, bank accounts and financial statements should be maintained. Each company must actually operate separately and distinctly from the other. Interchange of personnel and equipment should also be avoided. If such interchanges take place, then they should be done in a manner consistent with the "arm's length" relationships found among separately owned companies.

IV
Management

The factor, common management, depends on the day-to-day management of a company. For example, in *Sakrete of Northern California*,[22] the Ninth Circuit found single employer status because management of both companies was committed to one man who made all decisions with regard to purchase and sales contracts.[23] Similarly, in *NLRB v. Elias Brothers Big Boy, Inc.*,[24] two companies had the same officers and directors, and the same general manager was responsible for the day-to-day management of both companies.[25] The fact that each company

18. American Fed. of Television & Radio Artists v. NLRB, 462 F.2d 887, 892 (D.C. Cir. 1972).
19. Southwestern Council of Indus. Workers, 253 N.L.R.B. 808, 815 (1980).
20. NLRB v. Don Burgess Constr. Corp., 596 F.2d 378, 385 (9th Cir. 1979).
21. Los Angeles Newspaper Guild, Local 69, 185 N.L.R.B. 303 (1970).
22. 332 F.2d at 906.
23. *Sakrete of Northern California*, 332 F.2d at 906.
24. 325 F.2d 360 (6th Cir. 1963).
25. *Id.* at 362.

had a separate bank account, social security number, tax return and corporate identity was insufficient to prevent establishment of single employer status.[26]

In contrast, two unincorporated divisions of the Hearst Corporation constituted separate employers where each division head had substantially complete authority in the day-to-day operation of its division.[27] The District of Columbia Circuit reached this conclusion even though the Hearst Corporation possessed the "ultimate power to control" its divisons, because Hearst lacked *actual* common control and management.[28]

In order to avoid common management, the decision makers responsible for day-to-day operations of each company must be different, and each must exercise decision-making power independently. However, this requirement raises the question of how large the organization or system must be in order to make its "doubleness" or multiplicity legally effective. Circumstances will dictate the feasibility of separating management. Often, separating administrative and managerial staffs is not economically advantageous. This task may be simple between newspapers in distant cities; in medium sized telecasting and broadcasting operations it may be more difficult. Under any circumstance, the separation of managerial duties should be real, not just apparent. Preferably, each component should have an independent manager with broad discretion.

V
Centralized Control of Labor Relations

Centralized control of labor relations is often cited as the most critical factor and when combined with a high degree of common ownership[29] will usually give rise to single employer status. An important recent decision relating to this factor was *Peter Kiewit*.[30] Contrary to the NLRB, the District of Columbia Circuit in *Peter Kiewit* held that the imposition of a nonunion framework on one company by another constituted a substantial degree of centralized control of labor relations.[31]

---

26. *Id.*

27. *American Fed. of Television & Radio Artists*, 462 F.2d at 890-91.

28. *Id.*

29. *Birmingham Plastics, Inc.*, 221 N.L.R.B. 141 (1975).

30. 518 F.2d 1040 (D.C. Cir. 1975), *modified*, South Prairie Constr. Co. v. Local 127, Int'l Union of Operating Eng'r., 425 U.S. 800 (1976).

31. *Id.* at 1046.

The non-union framework of the new company was the touchstone for day-to-day decisions concerning wages, hours and conditions of employment. The court concluded that such exercise of control at the top level of management would not have been found in an "arm's length" relationship. Thus, the components constituted a single employer.[32]

Single employer status has been based on centralized control of labor-related decision-making: where upper levels of common management made the decisions regarding wages, hours, conditions of employment and conducted negotiations with striking employees;[33] where the same general manager established personnel policies, including clearance of all employees who were discharged;[34] where the same four men, who owned all the stock and constituted the board of directors of each company, formulated and administered the labor policies of two companies;[35]and where one company set all labor policies for the other and participated in contract negotiations, establishment of work rules, settlement of grievances and other matters relating to employee relations.[36]

Centralized control of labor relations is critical to the determination whether separate legal entities constitute a single employer or separate employers. The issue turns on a penetrating determination of who really makes the labor decisions in each company.[37] To achieve a double-breasted operation, the same person should not make these decisions for both businesses.

VI
Common Ownership and Financial Control

By definition, double-breasted operations have some degree of common ownership. Thus, this factor alone is not controlling.[38] Nevertheless, the degree of presence or absence of common ownership and financial control will be considered in determining whether single employer status exists.

---

32. *Id.*
33. *Sakrete of Northern California*, 332 F.2d at 906.
34. NLRB v. Elias Bros. Big Boy, Inc., 325 F.2d at 362.
35. NLRB v. Royal Oak Tool & Machine Co., 320 F.2d 77, 81 (6th Cir. 1963).
36. *Southwestern Council of Indus. Workers*, 253 N.L.R.B. at 815.
37. *Birmingham Plastics, Inc.*, 221 N.L.R.B. at 142.
38. NLRB v. Don Burgess Constr. Corp., 596 F.2d at 384.

VII
Benefits and Risks

If two companies constitute separate and distinct employers, they are entitled to all protections of the secondary boycott prohibitions of the National Labor Relations Act,[39] and are not liable for each other's unfair labor practices. The nonunion company is not bound by union contracts. If, however, the NLRB rules that the multi-headed entity really constitutes a single employer, then a union may picket the premises of both companies without either company having secondary boycott protections.[40] Further, each company could be held liable for the unfair labor practices of the other.[41] The risk inherent in deciding to "go double-breasted" is not only that the attempt may fail, but that the employer may incur liability for the unfair labor practices of one or more components, including substantial amounts of back pay for failure to honor a contract or to reinstate strikers.[42]

VIII
Reactions from Labor Organizations to Double-Breasted Operations

When the concept of double-breasted operations was developed in the construction industry, unions brought actions before the NLRB and courts to prevent them. As a result of these efforts, the four criteria for single-employer status were invoked to test the creation and maintenance of a double-breasted operation. As inflation forces the total package of many collective bargaining agreements upward to levels never anticipated by either party as a result of cost of living adjustment (COLA) clauses and various employee benefits, unions now confront employer bankruptcies, reorganizations, mergers and closures—all resulting ultimately in loss of jobs, declining union memberships and losses in NLRB elections. Accordingly, unions will continue to resist the formation and maintenance of double-breasted operations through litigation before the NLRB and the courts. The NLRB has already held that

39. See note 36 and accompanying text, *infra*.

40. *American Fed. of Television & Radio Artists*, 462 F.2d at 890.

41. *See* Local No. 627, Int'l Union of Operating Eng'r, 425 U.S. 800 (1976).

42. Newspaper Production Co. v. NLRB, 503 F.2d 821, 829 (5th Cir. 1974); Peter Kiewit Sons' Co., 206 N.L.R.B. 562, 575 (1973).

double-breasting construction firms must furnish information to unions on request about both their union and non-union components.[43]

It may be overlooked that employees in non-union components of double-breasted operations have a legal right to organize and will do so, if they believe organization to be to their advantage. However, such organization may prove a mixed blessing to the chosen union. For example, Walter J. Shea, executive assistant to Roy Williams, President of the Teamsters, was quoted on November 30, 1981, as deploring the number of trucking companies demanding separate negotiations and going double-breasted. The employers of each operation cannot be forced to continue or join in multi-employer bargaining with the chosen union. Moreover, in the trucking industry the trend toward double-breasting has been stimulated by the Motor Carrier Deregulation Act of 1980,[44] causing formation of a plethora of small, presumably independent trucking firms.[45]

In response, unions confronted with pleas for moderating their economic demands have bargained for trade-offs in the form of "neutrality" agreements[46] and agreements to not "go double-breasted."[47] The potential success of demands for contractual protections against double-breasted operations is unclear. However, several unions have already been successful in obtaining company neutrality agreements in which the employer agrees to refrain from opposing campaigns at new or other company facilities or agrees that the present collective bargaining agreement will cover employees in new plants without NLRB elections or certifications.[48] This success may indicate employers are willing to make non-economic trade-offs with unions. Nevertheless, union success in obtaining non-double-breasting clauses may depend on the particular industry and on the importance to employers of having double-breasted operations in that industry.

---

43. Leonard B. Herbert, Jr. & Co., 259 N.L.R.B. 126 (1981).

44. 49 U.S.C. §§ 10101-11917 (1976 & Supp. IV 1980).

45. Daily Labor Rep. (BNA) No. 229, at C-1-C-3 (Nov. 20, 1981).

46. "Neutrality agreements" are agreements between management and labor covering management's pledge to facilitate a union's work to expand its representation rights in new plants. Daily Labor Rep. (BNA) No. 248, at C-1-C-2 (Dec. 28, 1981).

47. Daily Labor Rep. (BNA) No. 243, at C-1-C-2 (Dec. 28, 1981); Daily Labor Rep. (BNA) No. 251 at C-1-C-2 (Dec. 31, 1981).

48. Neutrality letters exist between the United Auto Workers and General Motors Corporation, UAW and Deere & Company; the Rubber Workers and Firestone, Goodrich and Uniroyal. Daily Labor Rep. (BNA) No. 248, at C-1 (Dec. 28, 1981).

IX
Peculiarities of the Broadcast Industry

The broadcasting industry lends itself to double-breasting in that a single person or corporation may own AM, FM and television stations in widely separated localities, or occassionally in the same community, and operate them separately. To operate stations successfully as a double-breasted operation, the companies should have:

1. Different managers for each operation, managers should have full discretion over labor relations in day-to-day operations, and should establish and implement labor policies.
2. A separate location for each operation. Equipment, telephones and all administrative details must be maintained separately. For example, if equipment is lent to another operation, a rental fee should be paid.
3. No interchange of employees among the components. For example, if a bookkeeper is shared, he or she must be compensated separately. Further, there can be no promotion ladder through several components, no shifting of employees between components for convenience, nor fill-ins for absentees.

X
Conclusion

Double-breasting is a useful tactic under the right circumstances, but it is not a panacea. For example, it is especially useful for isolating a troublesome or strike-prone component from other parts of a system, or for building flexibility into a rigid, self-defeating pattern of industrial relations. However, employers must decide in each circumstance whether the expected advantages justify the cost of double-breasting. Employers should not try to use double-breasting to replace intelligent, good faith bargaining with unions.